

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITE HERE! LOCAL 8, AFL-CIO

Petitioner,

v.

THE NATIONAL LABOR
RELATIONS BOARD,

Respondent.

Case Number: 15-70377

**SPACE NEEDLE LLC’S MOTION FOR LEAVE TO INTERVENE
AND TO FILE INTERVENOR’S BRIEF**

I. BACKGROUND

On January 30, 2015, the National Labor Relations Board (“NLRB” or “Board”) issued the Decision and Order in dispute in the above-captioned matter. The underlying Board Decision and Order is reported at 362 NLRB No. 11. (*See* Doc. ID 9413185, DktEntry 1-2, pp. 5-28.) The Space Needle LLC (“Space Needle”) was the Respondent throughout the NLRB proceedings below. *Space Needle LLC and UNITE HERE! Local 8 and Julia Dube*, 362 NLRB No. 11 (January 30, 2015). (*See* Doc. ID 9413185, DktEntry 1-2, pp. 5-28.)

The Board’s January 30, 2015 Decision and Order is briefly summarized as follows: (1) the Board concluded that the Space Needle violated Sections 8(a)(5) and (1) of the National Labor Relations Act (“the Act”) by reneging on an

agreement to reinstate payroll dues deduction; (2) the Board found that the Space Needle violated Section 8(a)(1) of the Act by polling, interrogating, and/or coercing employees; (3) the Board concluded that the Space Needle violated Sections 8(a)(3) and (1) of the Act by failing to recall employees from layoff; and (4) the Board determined that the Space Needle did not violate Sections 8(a)(5) and (1) of the Act by allegedly changing its procedures regarding recall from layoff. *Space Needle LLC*, 362 NLRB No. 11, pp. 1-5 (2015). Additional charges of unlawful conduct were dismissed by the Administrative Law Judge and not appealed to the Board. *See id.* With respect to the remedy for the Space Needle's failure to reinstate dues deduction, the Board ordered that the Space Needle make the Union whole for any dues the Union would have received since January 29, 2013, without recouping the money owed for past dues from employees. *Id.* at p. 5.

On February 5, 2015, Petitioner UNITE HERE Local 8 ("Union") filed a petition for review of the Board's January 30, 2015 Decision and Order with this Court. (*See* Doc. ID 9413185, DktEntry 1-2, pp. 1-3.) The Union seeks review of the portion of the Board's Order which denied the Union's request to give retroactive effect to any dues-checkoff authorizations signed, which would require the Space Needle to pay dues to the Union dating back to the date the parties' agreement would have gone into effect. (*Id.*)

On February 6, 2015, the Space Needle also filed a petition for review of the same underlying Board Decision and Order in the U.S. Court of Appeals for the D.C. Circuit. (*See* Ninth Circuit Case No. 15-70520, Doc. ID 9428368, DktEntry 2-1, pp. 1-2.) The Space Needle's petition for review seeks reversal of the NLRB's Decision and Order finding that the Space Needle violated Sections 8(a)(5), (3), and/or (1) of the Act by failing to reinstate payroll dues deduction despite prior agreement, unlawfully polled employees, unlawfully encouraged or solicited employees to resign from the Union, unlawfully coerced or interrogated employees, and unlawfully failed to recall employees from layoff. (*Id.*)

On February 19, 2015, the U.S. Court of Appeals for the D.C. Circuit transferred the Space Needle's pending petition for review to the U.S. Court of Appeals for the Ninth Circuit, pursuant to an order from the Judicial Panel on Multidistrict Litigation. (Ninth Cir. Case. No. 15-70520, Doc. ID 9428358, DktEntry 1, p. 1.)

On February 27, 2015, the Board filed a cross-application for enforcement of the same underlying Decision and Order at issue in the pending petitions for review. (Ninth Cir. Case. No. 15-70630, Doc. ID 9439262, DktEntry 1-2, pp. 4-5.) On February 27, 2015, the Board also filed an unopposed motion to consolidate the two pending petitions for review and the Board's cross-application for enforcement of the same underlying Decision and Order. (Ninth Cir. Case No. 15-70377, Doc.

ID 9438680, DktEntry 10, pp. 1-5.) The proposed consolidated cases include the petition for review filed by the Space Needle (Ninth Cir. Case No. 15-70520), the petition for review filed by the Union (Ninth Cir. Case No. 15-70377), and the cross-application for enforcement filed by the NLRB (Ninth Cir. Case No. 15-70630). (*See* Ninth Cir. Case No. 15-70377, Doc. ID 9438680, DktEntry 10, pp. 1-5.)

Counsel for the Space Needle has contacted Counsel for the NLRB and Counsel for the Union regarding this Motion for Leave to Intervene and to File Intervenor's Brief. The NLRB does not oppose this Motion. The Union has not yet responded as to its position.

II. ARGUMENT

The Space Needle moves for leave to intervene in the above-captioned proceeding pursuant to Federal Rules of Appellate Procedure ("FRAP") 15(d) and 27.

A. The Space Needle's Motion for Leave to Intervene is Timely Filed.

FRAP 15(d) requires that a motion for leave to intervene be filed within 30 days of the date the petition for review was filed. Here, the Union's petition for review was filed on February 5, 2015. (Doc. ID 9413185, DktEntry 1-2, pp. 1-2.) The Space Needle's Motion for Leave to Intervene is timely filed within 30 days of February 5, 2015.

B. The Space Needle has an Interest in the Outcome of the Union's Petition for Review. Intervention is Necessary for the Space Needle to Protect its Interest.

FRAP 15(d) also requires that the party seeking intervention provide “a concise statement of [its] interest...and the grounds for intervention.” The Space Needle is an interested party in this case. The Union’s petition seeks review of the NLRB’s ordered remedy regarding the Space Needle’s failure to reinstate dues deductions. The Union will argue in this proceeding that the Space Needle should be required to pay back-dues to the Union for a longer period of time than is required pursuant to the Board’s Order.

If the Court were to reverse the NLRB’s Order with respect to the Union’s petition, the Space Needle would be solely financially liable for the additional dues sought by the Union. Thus, the Space Needle has a direct and substantial interest in the outcome of this review proceeding.

Moreover, as the Respondent in the underlying NLRB proceeding at issue, the Space Needle must be permitted to intervene as a matter of right in the appellate review of the NLRB’s Decision and Order here. *See International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 208, 86 S.Ct. 373 (1965) (concluding that both the party which is aggrieved and the party which prevailed in the NLRB proceeding below are entitled to intervene before the court of appeals

that is reviewing the NLRB's decision and order). *See also Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072, 1074 n.2 (9th Cir. 2008) (noting in a footnote that the respondent employer's successor was granted the right to intervene pursuant to FRAP 15(d) with respect to the petition for review of an NLRB order filed by the union); *see also New South Media Corp. v. FCC*, 644 F.2d 37, 37-38 (D.C. Cir. 1981) (in analyzing a similar but different statutory framework with respect to the Federal Communications Commission, the U.S. Court of Appeals for the D.C. Circuit held that a party with standing to appeal an agency decision may intervene in the appellate proceeding).

Applying the U.S. Supreme Court's analysis in *Scofield*, 382 U.S. 205, 86 S.Ct. 373 (1965), here, the Space Needle's Motion for Leave to Intervene must likewise be granted as the Space Needle was a party to the Board proceedings below.

C. The Space Needle's Interests Will Not Be Adequately Represented by the Other Parties in This Proceeding.

The Space Needle's interests will not be adequately represented in this review proceeding if it is denied intervention. A movant need only demonstrate that "representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10, 92 S.Ct. 630 (1972) (*citing* 3B J. Moore, Federal Practice 24.09-1 (4) (1969)).

As the U.S. Court of Appeals in the Seventh Circuit has recognized, “[i]ntervention by the original victor [in appeals of federal agency decisions] places the private adversaries on equal terms and permits both to make their own decisions about the wisdom of carrying the battle forward.” *Sierra Club v. EPA*, 358 F.3d 516, 518 (7th Cir. 2004) (the 7th Circuit Court of Appeals provided the example that a federal agency may not be willing to pursue en banc review or Supreme Court review of a decision, which may be desired by the private party (intervenor) impacted by the appellate court decision).

Here, the Space Needle will be solely responsible for the remedy imposed if the Court grants the Union’s petition for review. The Union’s position is directly adverse to the Space Needle’s position. The NLRB is also a party adverse to the Space Needle with respect to the underlying Board Decision and Order. The Space Needle has petitioned for review of the same underlying Board Decision and Order. (Ninth Cir. Case No. 15-70520, Doc. ID 9428368, DktEntry 2-1, pp. 1-2.) Among other issues, the Space Needle seeks review of the Board’s remedy imposed regarding dues deductions. Thus, the Space Needle’s interests are not adequately represented by the existing parties to this review proceeding. Intervention is appropriate and necessary here for the Space Needle to protect its legal interests in the pending petition for review filed by the Union.

D. The Space Needle Has Standing with Respect to the Union's Petition for Review.

The minimum requirements for standing are: (1) injury-in-fact; (2) causation; and (3) redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2120 (1992); *see also Sierra Club v. NRC*, 825 F.2d 1356, 1350-61 (9th Cir. 1987). The Space Needle was the Respondent in the NLRB proceedings below. As a party aggrieved by the underlying Board Decision and Order, the Space Needle has standing to appeal the matter pursuant to 29 U.S.C. §160(f). If the Court grants the Union's petition for review in this case, the Space Needle will be the party solely responsible for paying significant back-dues to the Union. The Space Needle would be directly harmed by such a result. The Space Needle has Article III standing with respect to the pending petition for review.

E. The Space Needle Also Seeks Permission to File an Intervenor's Brief.

To address the issues raised in the Union's petition for review, the Space Needle also requests leave to file an Intervenor's Brief. The Space Needle requests an allocation of 8,750 words for its Intervenor's Brief.

III. CONCLUSION

Intervention is appropriate and necessary here. The Space Needle is directly and significantly affected by the outcome of this review proceeding. It has been a party to the underlying Board proceedings since the beginning of the agency action

at issue. Granting intervention will not cause undue prejudice to the other parties or result in a delay of this review proceeding. For all of the above-stated reasons, the Space Needle respectfully requests that this Court grant its Motion for Leave to Intervene and to File Intervenor's Brief.

Respectfully submitted this 4th day of March, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 4, 2015.

I certify that the following participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system:

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I further certify that I caused a courtesy copy of the foregoing document to be mailed by First Class Mail, postage prepaid as follows:

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